

In reply, several points should be considered.

(1)

The examiner's response does not, it is respectfully submitted, address the Board's concerns as expressed in their remand, and specifically, concerns 1) - 3) [4)] noted above, and for this reason alone the Board should reverse the examiner.

(2)

The examiner stated in her response, "....the submissions do not present **direct** evidence sufficient to overcome the combination of elements...."(emphasis added). It is not at all clear what the examiner means by "direct evidence." The declarations relate to the experience of the declarants and as such are "direct," at least as Applicant/Appellant's understands the meaning of "direct."

It is settled that the Federal Rules of Evidence do not apply in the prosecution procedure in the USPTO. However, logic does apply. Why would the testimony of an expert in the field of endeavor which would tend to show commercial success not be considered and given its just weight? No apparent reason comes to mind.

It is recognized that the examiner does not have the opportunity to cross examine the experts, but he/she can ask questions which Applicant/Appellant would be compelled to address to the experts and present their answers. The examiner did not take the opportunity to ask questions, and instead merely dismissed the declarations. This is not permissible, and accordingly, the declarations should be given their just weight and the rejections dismissed.

Consider in this regard ***In re Aufhauser***, 158 USPQ 351 (CCPA1968) where Judge Smith instructed us to consider "affidavits [declarations] by those skilled in the

U.S. Pat. Appl. 09/319,243

art must considered so far as they state facts." In this case, the declarations do state facts and should, therefore, be considered.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Felix J. D'Ambrosio", with a long horizontal flourish extending to the right.

Felix J. D'Ambrosio
Reg. No. 25,721

May 29, 2009

BACON & THOMAS, PLLC
625 Slaters Lane-4th Floor
Alexandria, VA 22314
Tel: (703) 683-0500
Fax: (703) 683-1080